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Electronic Contracts Review
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Dear Registrar General

Response to Discussion Paper: Removing barriers to electronic land contracts

Westpac Group, including Westpac, St.George Bank, Bank of Melbourne and BankSA (**Westpac**) welcomes the opportunity to respond to the Office of the Registrar General on the discussion paper regarding removing barriers to electronic land contracts. As one of Australia's largest banks and a key player in the property industry, Westpac has valuable insights and years of expertise in the area of electronic contracts.

Westpac believes that electronic contracts provide clear benefits for our customers, and the New South Wales economy. They are cheaper, more efficient and the tools which accompany them can help our customers better understand the agreements they are entering. Westpac already relies on electronic signing of contracts in a number of areas of its business and is increasingly moving to electronic delivery and execution of contracts as well as electronic storage of documentation. In particular, Westpac through Bank of Melbourne is currently trialling the use of electronic signatures on mortgages in Victoria, with some 82 mortgages being entered into in that State using this form of execution.

Accordingly, Westpac supports reforms that will remove requirements or uncertainty that hinder the ability of our customers to transact electronically. Below we have provided our answers to the specific questions which directly concern us or the experience of our customers when transacting with us.

Land transactions and eConveyancing

Q.1 Should the formal requirements for registry instruments, such as mortgages and leases, be reviewed so that they can be created wholly by electronic means?

Yes, Westpac supports a review that removes any uncertainty about whether mortgages (and leases) can be created wholly by electronic means. It has become common in trade and commerce in Australia to enter into contracts electronically and there is no reason why this trend should not extend to mortgages and leases.

Current state

Westpac has conducted research about the current home loan process (including the requirement to wet sign a mortgage)¹. The research revealed the following:

1. Difficulties with the home loan and mortgage documentation process have been identified as the second most challenging aspect associated with a mortgage by current mortgagors.
2. A quarter of mortgagors have been impacted by delays in the home loan documentation process.
3. One in every ten mortgagors have either made mistakes when signing home loan documents or have had their documents lost in the post.
4. Around 62.4% of mortgagors have rated their documentation process experience as inconvenient and frustrating, primarily citing reasons such as difficulties associated with number of visits to the broker (41.6%), difficulty in following the process (37.7%) and security concerns (25.7%).
5. Time taken to send or receive the documents via post is one of the things considered as a challenge by mortgagors (34.8%).
6. About three in ten mortgagors (28.8%) have used a 'click to sign' electronic signing feature in the past, and the technology has received a notably high percentage of positive ratings in terms of likelihood of using it, owing to user-friendliness (68.9%), time-efficiency (82.5%), accessibility to digital loan documents (43.6%) and security (27.9%). Potential mortgagors who had used a 'click to sign' feature shared similarly positive perceptions about its utility.

While we acknowledge that this research does not deal exclusively with the electronic signing of mortgages and leases, it demonstrates that:

¹ The research consisted of an online survey (average completion time of 3-4 mins) completed by 1003 respondents who live in Victoria, aged between 24 and 55. The respondents consisted of people who already had mortgages, and those that did not. The objective of the research was to highlight weaknesses in the current mortgage loan document process, and to gauge whether those weaknesses could be managed through the use of an electronic signing solution.

- weaknesses with current wet signing requirements for mortgages likely contribute to dissatisfaction with the current home loans process; and
- there is a willingness among mortgagors to use an electronic signing solution.

Despite benefits to customers and the fact that entering contracts electronically is now commonplace in Australia, there remains uncertainty around whether mortgages can be created wholly by electronic means. This uncertainty means that we are currently in a position where we may need to present our customers with a package of documents containing some contracts which can be entered into electronically and some which cannot. This negates the advantages which may otherwise be gained from electronic contracts.

So for example in the context of a home loan, the home loan document can be signed electronically, providing efficiency, security, reduced error rates and convenience for our customers. If the mortgage must be signed on paper, these benefits are lost. Requiring a paper mortgage document is also inconsistent with the greater objective of paper free conveyances, facilitated by Property Exchange Australia (PEXA).

Westpac therefore supports a review of the formal requirements for registry instruments with the aim of clarifying that such instruments can be created wholly by electronic means. In particular, Westpac encourages the NSW Registrar-General to clarify that electronically signed mortgages meet the "approved form" requirement in s 56 of the *Real Property Act 1900* (NSW).

In the paragraph below, we explain the advantages of electronic signing, and explain how electronic signing can assist with the current shortcomings associated with the wet signing process.

Advantages of electronic signing

The ability to enter into mortgages electronically has several key benefits for our customers. An electronically signed mortgage, when compared to a wet signed paper mortgage, can be more efficient, cheaper, more flexible and secure, while enabling us to utilise innovative ways to help our customers understand the terms of their mortgage. Additionally, allowing mortgages to be signed electronically is consistent with our customers' expectations. Consumer testing conducted by Westpac in 2016 found that 70% of consumers prefer to receive their terms and conditions digitally (whether that be by using their mobile, tablet or computer)².

Electronic signing of mortgages would significantly reduce the time taken to complete a lending transaction, in particular time taken up posting documents. The reduced delay would also translate to significant cost savings for our customers. Our initial analysis suggests that the time to deliver, sign and return loan documents will be halved. One of our internal project teams has

² This figure is based on a survey conducted by St. George Bank in 2016. That survey was sent to 900 recipients, with 88 responses received.

also estimated that digital acceptance would save the average home loan customer 9 days, based on current processing times involving physical production, distribution, handling, returning, imaging and physical verification.

Electronic signing also has the ability to remove the inherent security risks involved with physical mortgage documents, in particular the risk that documents are left unsecured, intercepted by a third party or are lost in transit.

In addition, electronic delivery and signing of mortgages gives our customers increased flexibility. Customers can read and sign the mortgage at a time and place of their choosing (this is particularly important for time-poor consumers and those who live in rural and remote Australia) and retain access to the document in an easy way in the future (by storing it in their email account or on a computer hard drive). This is reflected in Minister Dominello's Foreword when he says, 'people should not have to rush to solicitors and bankers to sign paper documents. Instead, that time can be better spent reading through the important documents that upon execution would mark one of your most important life events.'

In addition, the technology involved with electronic signing of mortgages may improve a customer's understanding of their mortgage terms. Research indicates that earlier access to disclosure may be related to improved comprehension.³ This ability for technology to improve understanding of disclosure documents was also noted by the Financial System Inquiry, in particular Recommendation 23: *Remove regulatory impediments to innovative product disclosure and communication with consumers, and improve the way risk and fees are communicated to customers*. Allowing electronic execution of mortgages in New South Wales would enable mortgagors to access new and innovative means of disclosure. Such technology includes improved document navigation (for example, side-bar navigation), in context support (for example, defined terms can be explained via a pop-up window or How-to video), accessibility (readers can zoom in/out) and storage (that is, mortgagors can download and keep mortgage documents in a secure, easy to retrieve folder). These tools also have the ability to reduce the chance of an input or signing error occurring in relation to a mortgage, by directing the customer to the correct place to sign and drawing their attention to key parts of the mortgage. This technology can only be used for mortgages if they can be entered into electronically.

Finally, clarifying that mortgages can be executed electronically would have a positive environmental impact by reducing paper use.

³ See the Discussion Paper issued by the Treasury, *Changes to the Disclosure Requirements under the National Consumer Credit Protection Act 2009* (April 2013), available at https://static.treasury.gov.au/uploads/sites/1/2017/06/DP_Disclosure_Requirements.pdf

Q.2 Does the Verification of identity regime replace the need for witnessing for all land registry documents?

Witnessing does not add any significant value to the conveyancing system and should be dispensed with, in line with the position for mortgages in Victoria.

Witnessing can be an ineffective mechanism to ensure that a contract is properly executed because witness signatures can be easily forged.

The combination of a verification of identity process and the security measures which are available via electronic signing technology (such as authentication via SMS codes which must be entered in order to access documents for signing) provide a preferable and more robust outcome than a requirement for witnessing.

There are a number of significant practical impediments to having a person witness electronic execution and record that witnessing electronically. For example, many systems for electronic signing require the witnesses' phone number and email address to be recorded so that the witness can be included in the electronic signing process (eg receive notifications via email and SMS codes). Having to ask a customer to nominate who will witness execution of a contract prior to the event is far from ideal since circumstances can change. The need to collect personal information from a witness has other implications (such as the need to make privacy related disclosures) and the process for witnessing electronic execution is quite onerous as it can require a witness to log into an online platform, submit credentials and complete a number of steps.

Any benefit that witnessing may provide in the context of land registry instruments is outweighed by the issues associated with witnessing in the electronic environment and is addressed by the existing VOI regime.

Q.3 Are there any other gaps or uncertainties that need to be resolved to allow land transactions to be fully electronic?

It should be made clear that the counterpart of the mortgage executed by the mortgagor does not need to be a physical document. The Model Participation Rules do not expressly require that counterpart to be a paper counterpart and this counterpart is not required to be registered. However, guidance material issue by the Registrar describes the counterpart of the mortgage that is signed by the mortgagor as a 'paper counterpart'.⁴

⁴ See the Registrar General's Guidelines on Mortgage (electronic) available at http://rg-guidelines.nswlrs.com.au/e-dealings/elodgment/dealings_eligible_for_elodgment/mortgage_electronic.

For the sake of clarity and to facilitate electronic transactions in New South Wales, Westpac suggests repealing the provisions of the *Electronic Transactions Regulation 2017* (NSW) that exclude the application of the ETA to requirements for a document to be witnessed.⁵

Q.4 Should legislation intervene to regulate the use of electronic contracts in conveyancing, or is this a matter best left for conveyancing practice to develop within the current framework?

No. The current framework supporting electronic transactions is sufficient. Westpac is supportive of the use of electronic contracts for the sale of land.

Q.12 What methods of electronic signature are appropriate for sale of land contracts?

Westpac is strongly of the view that the methods used to effect electronic signature should not be prescribed in any context beyond what is already included in the existing legal framework (ie the electronic transactions legislation and the general law on electronic signing). It is vital that flexibility is retained and that parties are able to make use of advances in technology to effect electronic signing. The existing legal framework already provides appropriate flexibility and protections.

Q.13 Is there a need to clarify the appropriate methods to identify a signatory to an electronic contract, or whether that person had authority to sign?

No. Westpac does not support the introduction of any requirements in relation to signatories to electronic contracts which do not already apply to paper contracts generally.

In particular, Westpac does not support the introduction of prescribed methods for verifying the identity or authority of signatories. Parties must have flexibility to address identification and the existence of authority in a manner they consider to be appropriate in the circumstances, taking into account the nature of the contracting parties, their relationship and the degree of risk each party is willing to accept.

Westpac notes that maintaining a flexible approach is a feature of the identification requirement in section 9(1)(a) of the *Electronic Transactions Act 2000* (NSW).

Q.14 Should there be a witnessing requirement for electronically signed contracts? How might this be achieved in an electronic environment?

No. Westpac does not support any requirement for witnessing for the reasons stated in question 2. If a requirement for witnessing was imposed, there should not be any prescribed method for doing so for the reasons described in question 12.

⁵ Specifically, regulations 5(f) and 6(f) of the *Electronic Transactions Regulation 2017* (NSW).

Q.18 Should the law be clarified to enable a deed to be formed by electronic means? If so, should this relate to all deeds or limited only to those specifically relating to land transactions (such as option deeds)?

Westpac considers that there are strong legal arguments which already support the creation of deeds by electronic means. However, it is vital that this position is clarified to enable parties to transact electronically with certainty. This clarification should apply to all documents.

It is important to recognise that significant transactions are already conducted via electronic contracts and there is no policy justification for excluding deeds from the kinds of contracts which can be created electronically. No contract, regardless of type, should be required to be created or stored in physical form or in any other particular format. Accordingly, please refer our arguments in support of electronic mortgages and leases in Q.1, which apply equally to the electronic formation of deeds.

Allowing deeds to be formed by electronic means would also bring New South Wales in line with other jurisdictions where this is permitted, including as mentioned on page 17 of the Discussion Paper, the United Kingdom.

Q.19 If a deed is to be executed electronically, what form of electronic signature is appropriate?

For the reasons set out in Q.12, Westpac does not support the introduction of any new requirements for the form or method for electronic signature in any context. The existing legal framework (both under legislation and general law) to support electronic signing includes appropriate requirements while supporting flexibility, innovation and developments in technology. It is vital to us and our ability to meet the needs of our customers that this continues to be the case.

From Westpac's perspective, no particular form of signature is preferable to another. What is important is that the method used creates a record of the signatory's intention to be bound by the contract. This outcome can be achieved via many different methods and forms of signature under existing law relating to electronic signing, and this must continue to be the case.

Q.20 Should electronic signatures on deeds be witnessed? If so:

- **How can a witness attest to a signature in an electronic environment?**
- **Should the witness be physically present when the signer signs, or can this be performed through video link (such as Skype or Facetime) or other means?**

No. There should not be any witnessing requirement for deeds in an electronic environment. This is due to the reasons set out in question 2. If witnessing requirements were retained, there should not be prescribed methods of doing so for the reasons set out in question 12.

Q.21 Should the signatory be present when the witness signs?

No. If witnessing is required, confirmation of witnessing should be able to be recorded at a separate time and place to the act of witnessing. This is particularly important in the electronic environment since the witness is likely to need to log in to a device to record the witnessing and may need to do that separately to the device used by the signer. As noted in question 2, there are already significant practical impediments to witnessing in the electronic environment and if witnessing is to be required, additional impediments must be avoided.

We would welcome the opportunity to discuss our response with you and answer any further questions you may have. If you have any questions or require further information about our response, in the first instance please contact Jaimie Lovell on 0450 132 858 or via email at jaimie.lovell@westpac.com.au.

Yours sincerely,



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